NOMINATIONS—FEDERAL TRADE COMMISSION AND CIVIL AERONAUTICS BOARD

HEARINGS

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

NINETY-SEVENTH CONGRESS

SECOND SESSION

ON

NOMINATIONS OF
DR. GEORGE W. DOUGLAS, TO BE A MEMBER OF THE FEDERAL TRADE COMMISSION; AND DIANE MORALES, TO BE A MEMBER OF THE CIVIL AERONAUTICS BOARD

DECEMBER 8 AND 14, 1982

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NOMINATION—FEDERAL TRADE COMMISSION

WEDNESDAY, DECEMBER 8, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 10 a.m., in room 235, Russell Senate Office Building, Hon. Bob Kasten presiding.

Staff members assigned to this hearing: Anne G. Cantrel, staff director; and Loretta L. Dunn, minority staff counsel.

OPENING STATEMENT BY SENATOR KASTEN

Senator KASTEN. The committee will come to order. Today the Committee on Commerce, Science, and Transportation is pleased to conduct its hearing on the nomination of Dr. George W. Douglas to become a member of the Federal Trade Commission.

Dr. Douglas has been nominated to complete the balance of the 7-year term that began September 26, 1982. Dr. Douglas is the only witness scheduled for today's hearing.

George Douglas was born in Arlington, Tex., raised in Texas and Oklahoma. He received a B.A. degree in physics from Yale in 1960, an M.A. and a Ph. D. in economics from Yale in 1963 and 1967.

Since leaving graduate school, Dr. Douglas has engaged in an active teaching and consulting career, including consulting for a variety of Government agencies in the fields of industrial organization economics, transportation economics, regulated industries, and antitrust.

Dr. Douglas, we are pleased to have you here today. We are also happy that we finally got this hearing scheduled. You are clearly a highly competent economist and in my opinion well qualified to become a Federal Trade Commissioner.

Even though your academic and consulting career has taken you to Chapel Hill and Austin, you are certainly no stranger to Washington, D.C., and the Federal Government. I note that some of your consulting work has been with the Federal Trade Commission itself.

There are no other members of the committee here. However, there is a possibility that one or more members may come, and they may have statements to make. After you have a chance to make your statement, I have a few questions. You have already supplied the answers to several written questions from the committee and your biographical sketch. It is my hope that following today's hearing the committee will report your nomination promptly and that you will be confirmed during the next 7 or 8 days during this lameduck session.

[The biographical sketch follows:]

BIOGRAPHICAL SKETCH OF DR. GEORGE WARREN DOUGLAS

Address: 6204 Cat Mountain Cove, Austin, Texas 78731.

Date and Place of Birth: August 10, 1938, Arlington, Tex.

Marital Status: Married to Barbara Selden Douglas.

Names and ages of children: Geoffrey Randolph Douglas, age 21 and Barbara Lynne Douglas, age 19.

Education: Stillwater (Oklahoma) High School, 1952–56 H.S. Diploma 1956; Yale University, 1956–60 B.A. (Physics) 1960; University of Texas, 1960–61; Yale University, 1961–65 M.A. (Economics) 1963, Ph.D. (Economics) 1967.

Employment Record: June 1976–present, President, Southwest Econometrics, Inc., 3701 Executive Center Drive, Suite 254, Austin, Tex. 78731.

Septemer 1965–June 1976, Member of the Department of Economics, University of North Carolina, Chapel Hill. Entering position, Lecturer; last position, Associate Professor.

September 1974–June 1975, Visiting Associate Professor, Department of Economics, Univerity of Texas.

June 1968–September 1969, Economist, Office of Secretary of Transportation, Washington, D.C., and Brookings Economic Policy Fellow.

Government Experience: (1) Economist, Office of the Secretary of Transportation, Washington, D.C. June 1968–September 1969; (2) Consultant: Office of Secretary, Department of Transportation 1969–76 (not continuous); Antitrust Division, U.S. Department of Justice, 1974–76 (not continuous); General Accounting Office, 1976–77; Federal Energy Administration, 1975–76; President's Council on Wage and Price Stability, 1976–77; Nuclear Regulatory Commission, 1977–78; Federal Trade Commission, 1977, 1982; U.S. Department of Labor, 1977–80; Antitrust Division, Attorney General of Texas, 1981–present; and Federal Aviation Administration (Chairman, users advisory panel on Congested Airports, 1978–79).

Memberships: Amerian Economic Association; Southern Economic Association; Co-chairman, Arthur M. Okun Fellowship Committee, Yale University; and Alumni Fund Agent for the Department of Economics, Yale University.

Political Affiliations and Activities—

Memberships: Democratic Party and Northwest Hills Civic Association.

Offices held: None.

Financial Contributions: Nominal ($100 or less) contributions to Democratic National Committee, George McGovern Presidential Campaign, Jimmy Carter Presidential Campaign, George Bush for President Committee, William Clements for Governor Committee, various local candidates in non-partisan elections.

Services rendered: Assisted in Democratic primary campaign for U.S. Senate on behalf of Maury Maverick, Jr.

Honors and Awards: Academic scholarship, Yale University 1956–60 and Economic Policy Fellowship, The Brookings Institution 1968–69.

Published Writings—Book: "Economic Regulation of Domestic Air Transport: Theory and Policy" (with James C. Miller, III) Brookings, 1974.

Senator KASTEN. It is a pleasure to have you with us today, and the committee is prepared to hear a brief statement from you.

STATEMENT OF DR. GEORGE W. DOUGLAS

Dr. DOUGLAS. Thank you, Senator Kasten, for your kind words. I do have a brief prepared statement which I will read if it is OK.

Mr. Chairman and members of the committee, I am delighted to be here today to discuss with you my qualifications to be a member of the Federal Trade Commission. I am honored and gratified that the President has nominated me to this important position, and if I am confirmed by you and your colleagues I look forward to applying my energy and experience in carrying out the mandate of the Commission.

As you may know, my previous experience as an economics professor and as a practicing professional economist has persuaded me that consumers have sometimes been ill-served by the regulatory

agencies that were created for their benefit. This committee has been in the vanguard of redressing this situation through its pioneering legislation in reforming economic regulation by several agencies. I applaud you and your accomplishments, which I believe have substantially benefited consumers and producers alike.

The general bipartisan recognition of the value of competition, unhampered by unnecesary economic regulation, has resulted in a trend to reduce direct economic regulation by Government agencies. This trend only heightens the value and emphasizes the importance of the Federal Trade Commission.

If we are to place greater reliance on competitive market forces to supplant direct economic regulation, it is extremely important that our markets maintain the highest degree of competitive vitality. This is the task of the Federal Trade Commission. If confirmed, I can assure you that I will carry out my duties with the highest commitment to this ideal.

I also look forward to working with you, Mr. Chairman, and the members of this committee in refining the legislative mandate of the Federal Trade Commission, to improve its capability of carrying out the important role placed on it by Congress, and discussing with you how to improve the performance of the Commission.

Mr. Chairman and members of the committee, I look forward to addressing any questions you may have.

Senator KASTEN. Thank you.

At this point I would like to submit for the record a number of letters of recommendation which the committee has received, from William Brainard at Yale University, from Charles Knapp at Tulane, George Eads at the University of Maryland, James Lloyd from Washington, D.C., and from James Tobin from Yale University. I would like these letters inserted in the record.[1]

I know you had your graduate training from Yale, but in the press they have characterized you as a Chicago school economist, a conservative economist, in the kind of tradition of Milton Friedman and others. I wonder if you would like to just comment on how a person from Yale becomes characterized as being a conservative economist?

Dr. DOUGLAS. Well, that has always been curious to me. I did all of my economic training at Yale under its very distinguished faculty and worked very closely with Professor Tobin, who you may know recently received the Nobel Prize in economics. I also worked very closely with Arthur Okun, who was a member of and Chairman of the Council of Economic Advisers under President Johnson.

I do not intend to be disparaging of the Chicago school of economics, but I would like the record to be clear as to my intellectual pedigree, as it were. After training at Yale, I was on the faculty of the University of North Carolina, which is some distance from Chicago both in miles and in intellectual tradition; and also taught briefly at the University of Texas.

It has been my experience, however, that there is perhaps a misunderstanding in the public of perhaps the disparity among economic viewpoints of the different traditions. Certainly in the area

[1] See pp. 23-25.

of microeconomics there is a broad base of intellectual agreement among economists from the various intellectual schools of thought.

Senator KASTEN. One other thing that the press has mentioned about you, is that you are out to dismantle the FTC, that you and other Commissioners this administration might appoint would attack or dismantle the Federal Trade Commission. I would like to get your reaction to that kind of overall statement. From my personal conversations with you I know that that is not true, but I think it is important that we talk about it a little bit.

Dr. DOUGLAS. Right. Nothing could be farther from the truth. I tried to stress that in my opening statement. The mission of the Federal Trade Commission is to insure the effectiveness of competition in the marketplace. The reappraisal of direct regulation which I and many other economists have done in the last 10 years has, I think, placed more reliance on competitive forces, and it is the mission of the Federal Trade Commission to insure that these competitive forces do in fact operate for the benefit of consumers.

So I am very interested in vigorous enforcement of the FTC mandate, that consumers not be deceived, that there be vitality and competition in the marketplace, that markets not be monopolized, that horizontal conspiracies should be detected and vigorously prosecuted. The mission of the FTC is very important and I see no desirability in diminishing its role.

Senator KASTEN. Could you comment specifically about the role that the FTC should have with antitrust enforcement authority? Over the past year or two a number of us have felt strongly that we ought to retain that authority in the FTC. But there is also, I should say, a body of opinion that the FTC should not have antitrust authority and that it is duplicative. Could you comment on that in general?

Dr. DOUGLAS. Yes. I have seen reports that perhaps the FTC enforcement authority in the antitrust area is duplicative of the Department of Justice, and perhaps the FTC should get out of the antitrust business.

I do not agree with that assessment. I think the FTC brings to antitrust enforcement a different strength than is possessed by the Department of Justice. It brings with it strengths of economic expertise and analytic capability. The very fact that its investigations do not have the assistance of the threat of criminal prosecution I think causes the FTC to develop a better facility to investigate in an economic setting.

I think the two agencies could be very complementary in working to enforce the antitrust laws.

Senator KASTEN. So that the Federal Trade Commission should continue to have antitrust enforcement authority in your opinion?

Dr. DOUGLAS. In my opinion it should, yes.

Senator KASTEN. In answer to some of the written questions that we sent to you, you suggested that the Federal Trade Commission could usefully help the Justice Department in detecting and prosecuting bid-rigging schemes. Could you explain that or expand on that slightly, please?

Dr. DOUGLAS. Yes; this is really an example of what I was trying to say in the abstract in answer to your last question. And bid rigging is an activity which has come to my attention recently in my

professional experience, doing some contract work for the attorney general of the State of Texas.

In this particular assignment for the attorney general, I was able to observe the detection and the evidentiary gathering technique of the Department of Justice in pursuing their cases, and I also saw that there was a substantial amount of economic-type evidence and data which was generated routinely by the State agencies involved. And it struck me that an agency such as the Federal Trade Commission could, with its economic expertise, perform econometric analyses on this type of data and be of great assistance to the Justice Department and the State attorneys general in locating areas in which there is a reasonably high probability that some collusion is taking place.

Now, this type of analysis may be inadequate as evidence in proving up the case, but I think it would be invaluable to the Department of Justice and the State attorneys general in knowing where to look, how to use their investigative powers most effectively.

Senator KASTEN. Senator Ford has joined us. I am not sure if you have a brief opening statement or questions but we would be happy to here from you at this time.

Senator FORD. Mr. Chairman, I have no opening statement, but I do have a couple of questions. Are we going to have any other Senators with us this morning that you know of?

Senator KASTEN. It is not clear right now. I do not know of any other Republican Senators who plan to be here.

Senator FORD. Maybe they can yield their time to us.

Dr. Douglas, I am going to ask you a lot of questions this morning. I know you are well prepared, because everybody down at the Commission is expecting me to do this.

Even though you have stated you feel it is premature to propose any changes in the FTC activities, you must have some ideas concerning some of those activities you would want to discontinue. Can you give me the benefit of your preliminary thoughts?

Dr. DOUGLAS. Well, Senator, I can really speak only very generally about the activities that I have seen at the FTC in the past, say, 10 years. And while I think it is perhaps unfair to characterize the current level of activity at the FTC by the 10-year experience, I think in general the FTC has perhaps been overly ambitious in areas of what might be considered social concerns or, as the Washington Post characterized it, as being the national nanny.

Senator FORD. The what?

Dr. DOUGLAS. The national nanny, or what I sometimes call coercive paternalism.

In protecting consumers in the marketplace, I think it is easy to slide from insuring that they have proper information, that they are not deceived by advertisers or manufacturers, to extend the activity to try to direct the consumer's behavior itself. And there were perhaps some tendencies toward that kind of overinvolvement in consumer choice that existed perhaps in the last 10 years.

I do not see anything of that happening in the current past year, but I think that gives you some insight as to a change in emphasis that I am glad to see happen.

Senator FORD. What kind of working relationship do you foresee with the Chairman of the Federal Trade Commission?

Dr. DOUGLAS. I will work with the Chairman, just as I will work with the other four Commissioners. I certainly am an independent thinker. I will look at each case on its merits and come to my own conclusions.

Senator FORD. That is a very interesting statement. There have been allegations that you have been introduced to FTC officials. You indicated that you were looking forward to working for Jim Miller. Do you consider that your function as a Commissioner?

Dr. DOUGLAS. No, sir. And I do not know who quoted me as saying that I looked forward to working for Jim Miller, but it is certainly a misquote. I have never said that.

Senator FORD. Well, how long have you known Jim Miller?

Dr. DOUGLAS. I have known Jim Miller about 10 or 12 years.

Senator FORD. All right. What kind of association have you had with Jim Miller?

Dr. DOUGLAS. Primarily professional. We worked together for the Department of Transportation when we were taking the first look at airline regulation. We helped compile the economic evidence which the Department of Transportation used in some generic regulatory proceedings. Subsequently, our research led to writing a book together and also some scholarly articles.

It has been, I would say, primarily a professional relationship. We have a relationship of equals. I am in fact Jim Miller's senior. We are each two independent people.

Senator FORD. Jim Miller told me that y'all think alike. Is that true?

Dr. DOUGLAS. Well, I guess you could start from the perspective that we are both economists and that right away that means that we have a certain method of thought that is similar. That is, we share that common ground, being economists.

It is certainly not true that we approach each problem exactly the same, or that we come out with the same answers. As I was explaining before you came to the room, while sometimes I have been characterized in the press as being a "conservative economist" or perhaps a Chicago school economist even, my intellectual tradition is founded with my training at Yale University, which is quite a different intellectual tradition and pedigree than that of a Chicago school economist, and it is also a different economic training and pedigree than that of Jim Miller.

Senator FORD. Do you all get the same background and training and education, regardless of what school of economics you attend?

Dr. DOUGLAS. There is a great commonality, especially in the area of microeconomics and industrial organization. However, the fact that we are both economists and share a similar methodology does not mean that economists always come up with the same conclusions.

Senator FORD. You said that being a Yale graduate, that indicated to me that you would be a different kind of economist than somebody who graduated from some other school?

Dr. DOUGLAS. To some degree that is correct, yes, sir.

Senator FORD. Do they brainwash you there or are you independent? How do you arrive at being a different kind of economist coming out of Yale?

Dr. DOUGLAS. Well, it is a little difficult to explain.

Senator FORD. You just said you were different. Now tell us how you are different.

Dr. DOUGLAS. Perhaps one of the symbolic ways in which we are different, I do not wear an Adam Smith tie.

Senator FORD. Well, some of us cannot afford one.

Dr. DOUGLAS. I do not own an Adam Smith tie. I say that as not totally in jest, sir. It is indicative somewhat of the distinction between the Chicago tradition and the Yale tradition. While both traditions teach classical microeconomics, that is how the markets work, how price theory works, and have also an equal allegiance to economic efficiency and consumer sovereignty, there is perhaps a difference in the starting place.

It is hard to characterize a Chicago School economist, and I do not want to mischaracterize either that tradition or Chairman Miller. So the examples I am giving to you are totally hypothetical and I am not trying to cast aspersions.

It is sort of looking at a glass that is half full of water and deciding whether it is half empty or half full. Chicago School economists perhaps have a greater innate faith that whatever transpires in a free market is necessarily a good thing, that it is just our task to find out and understand why it has occurred, and that the chance is 99 out of 100 that what has occurred is in fact something which is explainable and which reflects economic efficiency.

A distinction to that approach is that of the tradition which I was educated in, which is perhaps more skeptical, substantially more skeptical of whether the operation of a free market will always, 99 out of 100 times, generate economic efficiency. There is perhaps a greater skepticism, a greater alertness to all the many things that can go wrong in the operation of a market system.

Senator FORD. You were appointed as a consultant to the Chairman, I believe, in May of this year, is that correct?

Dr. DOUGLAS. That is correct.

Senator FORD. And you stated your principal activity was consultation with the Bureau of Economics on bid rigging. Did you do anything else?

Dr. DOUGLAS. No, sir. That is all.

Senator FORD. Is the FTC considering action in this area?

Dr. DOUGLAS. I would hope so. Before you came in, Senator, I discussed at some length with Senator Kasten——

Senator FORD. I apologize for not getting here and if you want to relate it, just give me a ministatement on it. You do not have to rehash the whole thing.

Dr. DOUGLAS. I was explaining that recently, even currently, my firm is retained in a highway bid-rigging case by the State attorney general of Texas, and this has been a very interesting case, one of many cases that is following on the heels of U.S. Department of Justice criminal prosecutions.

In doing our preparation for this case, we became very interested in the whole area of bid rigging, and it struck me at that time that this would be a very useful thing for the Federal Trade Commis-

sion to become involved in. I did some brief work for the Federal Trade Commission, trying to inform the Director of the Bureau of Economics what the opportunities are in this area, what kind of work has been done, research.

Senator FORD. Did you recommend to the FTC that it get into this area, is that what you're telling me, that you were employed as a consultant after your recommendation?

Dr. DOUGLAS. Yes, sir.

Senator FORD. We are getting some good answers. Do you feel that your past representation of many different business clients will create any conflict of interest in your judgment on the FTC, will you have to recuse yourself?

Dr. DOUGLAS. No, sir.

Senator FORD. You do not think that will bother you at all?

Dr. DOUGLAS. No, sir. In each of my consulting employment experiences, the relationship has been, with a slight exception, a one-shot deal, helping an attorney in an antitrust type proceeding, a merger type proceeding. I developed no close relationships, no working relationships with any of the personalities in the business. So I have no loyalties to that business, no personal relationships with the officers of the business.

Senator FORD. Let us talk a little bit about whether you are a Democrat or a Republican. What do you consider yourself?

Dr. DOUGLAS. I consider myself to be a Democrat.

Senator FORD. Under the laws of Texas, you have been a Republican also in the last few years, have you not?

Dr. DOUGLAS. Well, not to my understanding. No, sir.

Senator FORD. Well, the law of Texas has been, you vote in a primary and you select your party. Then you are a member of that party throughout that particular voting year.

Dr. DOUGLAS. Well, I am not familiar with that law, Senator, but if technically that is the case. I am a registered Democrat since I voted in the last Democratic primary.

Senator FORD. You are guilty of being a Republican? Is that it? Short-term? You did not stay the course.

Am I correct that you have pulled the Republican lever in the primary, and 1980 was the particular primary?

Dr. DOUGLAS. That is correct.

Senator FORD. When was the last time you voted in Texas?

Dr. DOUGLAS. In May of this year.

Senator FORD. You did not vote in the fall?

Dr. DOUGLAS. Oh, I am sorry. I did vote in the fall. I thought you were talking about primaries.

Senator FORD. I said, the last time you voted in Texas. But you did vote this past November and last May?

Dr. DOUGLAS. Yes, I did.

Senator FORD. Do you think, from looking at your record, being a Democrat and a Republican, would it not have been better if you had been submitted as an independent rather than a Democrat?

Dr. DOUGLAS. Senator, I consider myself a Democrat, and I am really not conversant with all the considerations as to whether——

Senator FORD. I am just talking about the imagery here. You have contributed to both parties, which is fine. That is your privilege. And I do not fault you for that. The law says that there be no

more than three of any one party on the Commission, and they have three Republicans, and you will be the second Democrat. I think Mr. Pertschuk is the other Democrat. But I am saying, having been a Republican in Texas in the last 2 years under their law, having contributed to both parties, that you would come as an independent thinker rather than a member of a particular party.

Dr. DOUGLAS. Well, if you follow that line of reasoning, Senator, even though I do not concede that I am not a Democrat, it is still within the scope of the law. The law simply says that there shall be no more than three of one party, but in any event, I do not wish to be mischaracterized as being so evenhanded on both counts. While I have contributed to both parties, the ratio easily exceeds 10 to 1 in terms of Democratic candidates, in terms of financial support.

My overall voting record over the years has been uniformly Democratic, with only one exception in terms of a primary election. At the 1980 Presidential primary in Texas, the Democrats really did not have a primary, and there were thousands and thousands of Democrats in Texas who voted in the Republican primary that year.

Senator FORD. They did not stay the course this year.

In your answers to the prehearing questions, you indicated that the FTC's authority over deceptive advertising may need to be changed. I am sure you have had an opportunity to reflect further on this since the prehearing questions. Do you agree with Chairman Miller's proposal?

Dr. DOUGLAS. Senator, this is an area in which I really would like to have more experience and study as to what the problems in defining deception are before endorsing Chairman Miller's proposal. My study of the problem up until this point has only persuaded me that the Commission does need further guidance, that the Senate, that Congress should tell the FTC what standards it should be following in defining deception, what level of credulousness should the FTC be protecting.

And as to the efficacy of existing case law precedent, I am not up to date on that, so I do not know what the current boundaries are that the FTC operates under. But it seems to me that the Congress should address itself to those issues.

Senator FORD. You have worked for the FTC on various occasions, have you not, Dr. Douglas?

Dr. DOUGLAS. Yes, sir.

Senator FORD. Over what period of time have you been associated as a consultant? I guess that was your employment.

Dr. DOUGLAS. As a consultant, I only served in that capacity over approximately a 4-month period this summer.

Senator FORD. Let us see. You worked in 1977 also, did you not?

Dr. DOUGLAS. That is correct.

Senator FORD. Do you consider it your responsibility to ensure that studies managed by you are accurate?

Dr. DOUGLAS. That is correct.

Senator FORD. If so, why would you offer up a study that contained so many alleged flaws that it was discredited on cross examination in a recent case?

Dr. DOUGLAS. Well, most of the alleged flaws were just that, Senator. They were alleged. They were not flaws.

Senator FORD. Well, did they not put it in as a part of the record after cross examination?

Dr. DOUGLAS. That is correct, but I think the term the judge used was "inconsistencies." The problem, Senator, was that in the body of the report, one step in the methodology which was used in reducing some data to the numbers that appeared in a table, one step was not written into the text. So the respondent's counsel, in trying to recreate from the raw data the numbers that are in the report, in some instances could not come up with the same numbers, and on the stand, given the report, and given the fact that I had not personally generated these numbers, I also was unable to do so. This did not make those numbers wrong. It simply meant that one of the steps was omitted in the text.

Senator FORD. Well, garbage in, garbage out, isn't it?

Dr. DOUGLAS. No, sir, it was not garbage in, garbage out, it is simply that the numbers——

Senator FORD. If you leave out a whole step, from there on it is wrong, is it not?

Dr. DOUGLAS. No, sir. The numbers were calculated using that step. The numbers were properly calculated.

Senator FORD. Was it your report?

Dr. DOUGLAS. That is correct.

Senator FORD. And you could not on the stand make the numbers come out?

Dr. DOUGLAS. That is correct.

Senator FORD. Thank you. Let us get back to the advertising. As you know, I am sure, Chairman Miller wants the FTC to solicit public comment about the ad substantiation program. The law currently says an advertisement must have prior substantiation. Do you think that that law should be repealed or modified?

Dr. DOUGLAS. Well, first of all, I am not sure that it is a law. I think it is a program of the Commission how they interpret their mandate, but as to whether that program should be modified, I am not able to speak to that right now.

I think the process that we have is a reexamination of the program, and the purpose of the reexamination is to see if it should be modified.

Senator FORD. It is FTC's interpretation of the law, is it not?

Dr. DOUGLAS. That is correct, yes. But the purpose of the public comment is to exactly—it goes to that point. How effective is the program now? Could it be modified to make it more effective? And obviously it would be premature to prejudge the results of this investigation.

Senator FORD. Do you think corrective advertising is a useful and effective remedial tool?

Dr. DOUGLAS. I would not want to rule out the use of corrective advertising, Senator. I would like to see some evidence from the marketing people who understand how people respond to messages, whether corrective advertising is effective in clearing up previous deceptions. If it is effective, it may be very important to keep consumers from continuing a pattern of consumption behavior that is

injurious because they have not been made aware that previously they were deceived.

Senator FORD. So you really do not know whether it is good or bad?

Dr. DOUGLAS. No, sir, I do not.

Senator FORD. You would not recommend it?

Dr. DOUGLAS. Not without further evidence.

Senator FORD. Do you have any firm ideas about what you want to do when you get on the Commission, some things that you want to change, some things you have fixed in your mind that you would like to do? Somebody you want to get after? Or some industry that you think needs looking at a little bit more than others? Do you have any kind of fixed position in your mind at this time?

Dr. DOUGLAS. Really, the only thing that I have that I would like to suggest with some force is that the FTC find itself a niche and a role in antitrust enforcement that capitalizes on its advantages, its comparative advantages with the Justice Department. An example would be to become very familiar and do some research in the area of horizontal conspiracies, bid rigging, if you will, to enable the FTC to more efficiently carry out its mandate and benefit consumers.

Senator FORD. Well, FTC has recently been criticized for not initiating cases. I think both the House and Senate Small Business Committees criticized the administration and its seemingly "hands off" attitude toward enforcing the Nation's antitrust laws. Do you believe the antitrust laws on the books should be enforced?

Dr. DOUGLAS. Yes, sir.

Senator FORD. Generally, is there anything about current antitrust policy at the FTC and Justice that you do not like or would do differently? Can you tell me what and why?

Dr. DOUGLAS. Well, Senator, I think it is premature to say what Justice or FTC is doing wrong. In terms of the level of activity, I think that is understandable not as a decreased commitment to antitrust enforcement, but certainly in the case of the FTC a reorientation of the style and the approach.

As to the other developments that have occurred that I am aware of, there has been a Department of Justice merger guidelines revision and a new merger guideline revision by the FTC. I have briefly looked through both documents, and I think they are substantial advances. They are bringing merger policy up to the forefront of our current economic knowledge of the way markets operate.

Senator FORD. Do you believe that the Secretary of Agriculture should first determine where the activities of an agricultural cooperative do not fall within the purview of the Capper-Volstead Act before the FTC can investigate those activities?

Dr. DOUGLAS. Well, I am afraid you are getting into a technical area that I am really not that familiar with, Senator. I am sorry. I would not be able to answer your question intelligently at this time.

Senator FORD. Let me ask you another one and see if I can get an opinion out of you. Does section 5 of the FTC Act barring unfair methods of competition add to the antitrust laws? Do you believe

that Congress should consider giving a more specific definition to unfair methods of competition?

Dr. DOUGLAS. Yes, sir. I have read the committee report for the reauthorization of the FTC, and I read in it that there is such a definition for unfairness. I think that is a very welcome addition to section 5.

Senator FORD. This committee has on the Senate floor for consideration the FTC authorization legislation. Have you had an opportunity to read that bill?

Dr. DOUGLAS. Yes, I have.

Senator FORD. Are you for or against that piece of legislation?

Dr. DOUGLAS. Well, I am in general for it. There is one section which I disagree with, and I made it clear in answer to questions, which is the exemption of the professions.

Senator FORD. Well, it appears, though, that Congress in its wisdom, some people say, will pass it. If it is passed, how will you treat it then?

Dr. DOUGLAS. Well, obviously, Senator, if it is passed and the professions that are regulated by State boards are exempt, they are exempt. There is nothing we can do but follow the law.

Senator FORD. Well, there are ways of following the law and then there are ways of following the law. Are you going to work out or will you attempt to work out a direction that both the FTC and the States should follow as it relates to the exemption? There may be some fields that you might try to retain.

Dr. DOUGLAS. Well, Senator, all I can say is that we would obey the law. I have no intention of contriving ways to evade the law that Congress passes.

Senator FORD. Mr. Chairman, I have several other questions, and I do not want to take any longer. But I do have some posthearing questions I would like to have the nominee answer before I can make a judgment.

One final question, Dr. Douglas. Your name has been floated around up here for 5 or 6 months. Do you know why the administration was so long in sending your name up, why it took so long?

Dr. DOUGLAS. My understanding was that the FBI security investigation took 4 or 5 months.

Senator FORD. Does that lend itself to all the securities and everything that you might have? I understand you are going to put all of those in some kind of mutual fund so you will have no control over them.

Dr. DOUGLAS. That is correct.

Senator FORD. The FBI investigation took 5 or 6 months?

Dr. DOUGLAS. No, it took about 4 months, I think.

Senator KASTEN. We may be receiving one more statement for the record from a trade association, I believe an association of retailers, which would be included in the record. If you do have additional questions for the nominee, hopefully we can get those questions to the nominee relatively quickly so that he has an opportunity to respond so that we can still deal with this nomination during the lameduck session. We would be happy to work with you in any way.

Senator FORD. I think I might be able to have those questions on Dr. Douglas's desk in the morning.

Senator KASTEN. Good.

Senator FORD. It may take him a little longer than 24 hours to answer them. But I do not think that his delay will be based on receiving my questions.

Senator KASTEN. Dr. Douglas, Texas does not have registration by political party. It is my understanding, though, that you have also been a resident of North Carolina. North Carolina does have registration by political party. When you lived in North Carolina, which political party were you registered in?

Dr. DOUGLAS. I was a Democrat.

Senator KASTEN. It is my understanding that you have lived in the State of Connecticut as well, and they have registration by political party. With which political party were you registered?

Dr. DOUGLAS. Democrat.

Senator FORD. Mr. Chairman, I might say that I understood from his resume that this was the fact. The only thing I was trying to do was to get his recent attitude.

Senator KASTEN. I am just trying to figure out if he stayed the course.

Earlier I submitted for the record a couple of letters of recommendation which were sent to Senator Packwood. I would like to bring people's attention to some specific comments.

The first specific comment is from James Lloyd, who is a Washington, D.C., attorney. He said he had worked with George Douglas on a number of merger acquisition cases during the past several years. "In short, George has a tough, independent mind. He is nobody's clone."

James Tobin, professor of economics at Yale, said, "He is a first-rate economist, expert in analytical and statistical tools and their application. He is a man of commonsense and realism. He is an independent in mind, not in any way doctrinaire or ideological."

And William Brainard, at Yale also, "His scholarship is first-rate and shows an independent and nondoctrinaire mind at work."

As I said before, I hope that the committee will be able to consider and report your nomination promptly. We will work with all of the committee members in providing you with additional questions if there are some. Hopefully, we will get them to you and you will get them back to us as quickly as possible. Then the Senate will have a chance to act on your nomination before we adjourn.

The vacancy that you are filling has been open all too long. I think everyone agrees with that. That vacancy has been open since April, 1981 which is almost as long as I have been in the Senate. I look forward to working with you following your confirmation, and I thank you very much for your appearance here this morning.

Senator FORD. Let me ask you one more question, just a yes or no. Going back to your explanation of the Yale and the Chicago schools, would you say that your interpretation would be that Yale would be liberal and Chicago would be conservative?

Senator KASTEN. Yale would be liberal.

Dr. DOUGLAS. I guess that would be the most easily understood definition, yes.

Senator FORD. Thank you, Mr. Chairman.

Senator KASTEN. Now you have got me worried.

Senator FORD. You have been worried for 18 months.

Senator KASTEN. Dr. Douglas, thank you for your testimony before our committee this morning. We look forward to working with you.

Dr. DOUGLAS. Thank you, Mr. Chairman and Senator Ford. I really appreciate your taking time in the hectic schedule of this session to meet with me.

[The questions and answers referred to follow:]

QUESTIONS OF THE COMMITTEE AND THE ANSWERS THERETO

MAJORITY QUESTIONS

Question. What areas of the FTC's antitrust enforcement authority would you emphasize and which would you deemphasize? In your answer, please specifically address enforcement in the areas of conglomerate and vertical mergers, vertical distribution restriction, resale price maintenance, and predatory pricing.

Answer. If confirmed, I would encourage the Federal Trade Commission to emphasize enforcement activities in areas in which there is substantial consumer injury and therefore a strong likelihood of consumer benefits from FTC action. In my judgment, as an economist, the areas with the greatest potential for injury to consumers and to economic efficiency are the acquisition and exercise of monopoly or market power and the exercise of market power through horizontal conspiracies. The potential extensiveness of consumer injury in these areas is vast and the resources of the FTC could usefully augment the strained resources of the Department of Justice and the State Attorneys General in detecting and prosecuting these abuses. As an example, the Department of Justice and the State Attorneys General are currently prosecuting pervasive bid-rigging conspiracies by highway contractors invoving actual monetary injuries in the billions of dollars. The FTC might employ its resources and expertise in detecting and prosecuting similar conspiracies.

The Federal Trade Commission should encourage vigorous price competition but must also be alert to the detection and prosecution of predatory pricing activities that are designed to acquire monopoly market power. Since administration of predatory pricing jurisdiction can be a two-edged sword, it may be beneficial for the Federal Trade Commission to develop guidelines incorporating economic principles in this area.

The pace of conglomerate and vertical mergers appear to have abated somewhat and in many instances, contrary trends are appearing. The FTC should continue to monitor conglomerate and vertical mergers to ascertain any threat to the vitality of competition in the economy. Particular attention should be focused on acquisitions in highly concentrated markets in which vertical or conglomerate mergers may injure competition by removing potential competition or foreclosing markets to other competitors. In my judgment, these types of mergers currently pose less of a threat of injury to competition and economic efficiency than horizontal mergers and should receive commensurately less emphasis.

Injurious vertical restraints are usually manifestations of market power possessed by firms in a horizontal sense. The Commission should trace back instances of vertical restraints to their source and where possible, pursue remedial action at both levels. Thus, I think that enforcement emphasis in vertical restraint should be in those areas where economic factors suggest that the violation poses potentially significant injury to consumers. For example, retail price maintance violations that are linked to, or might engender, horizontal price fixing conspiracies should receive more attention than technical violations in an otherwise highly competitive marketplace.

Question. What statutory or non-statutory changes would you suggest in the FTC's authority to prohibit deceptive advertising?

Answer. It would be premature for me to suggest specific changes at this time in the FTC's authority to prohibit deceptive advertising. I would encourage the Committee to explore carefully statutory changes which would direct the Commission to rely less heavily on its own expertise in defining deception and to predicate a violation only upon demonstration of likely consumer injury.

MINORITY QUESTIONS

Question. You have testified in a number of CAB merger cases; for example in the Texas International (TI)-Continental Acquisition, you testified against TI acquiring Continental; in the Western-Continental merger, you testified in favor of the merger. What has been your philosophy in this area?

For the record: In each merger case listed in your answers to Committee questions, briefly describe the situation, summarize your position and the rationale for it.

Answer. My testimony in airline merger cases was coincident with the deregulation of the airline industry. The success of airline deregulation relies heavily on the vitality of competition, and as an exponent of deregulation, I am very sensitive to this. By the same token, the industry organization which evolved under years of regulation was very uneconomic, and the achievement of the benefits of deregulation in lower costs and improved service would require operational and financial restructuring. In some cases this restructuring might be achieved most expeditiously and efficiently by merger. Therefore, my philosophy of appropriate antitrust enforcement, as illustrated in this industry, places great reliance on a realistic depiction of the economic forces that are operative in the particular industry—in essence, how competition works and how it might be injured. Traditional market structure analysis (i.e., definition of "relevant markets" and reliance on market share/concentration ratio analysis) is particularly inappropriate in describing competition in this industry. Rather, we undertake a "functional analysis," which focuses on the specifics of competition which are relevant in this industry, particularly entry conditions, to analyze the likely impact on competition of the specific merger and the likelihood of the merged firm acquiring market power.

I have testified in the following airline merger cases before the CAB. I have provided the Committee with copies of my testimony in each case. I will here briefly summarize my analyses and testimony:

(a) Continental-Western merger application, December 1978

My analysis of the competitive implications of this merger reviewed first, the general economic characteristics of the industry which my own research (as well as that of others) found and which led to the Airline Deregulation Act of 1978, and second, the specific factors affecting the proposed merger. My analysis and testimony pointed to the high degree of competition inherent in the industry due to highly mobile capital, and absent regulatory controls, low costs of entry and exit. A specific analysis of existing direct competition between the two carriers was undertaken; in each case adequate numbers of existing and potential competitors were identified to ensure competitive behavior. I concluded that the merger would not injure competition and would likely enhance competition in arterial routes.

(b) Tiger International-Seaboard World Airlines, Inc., acquisition case, May 1979

My analysis of this merger of the two largest all-cargo carriers concluded that it would have undesirable anticompetitive effects. These two carriers were the only carriers providing wide body air freighter service in the U.S. at that time. From my analysis, it was clear that the economics of domestic air freight are tied to international air freight markets which are not deregulated and where entry is not open. For this and many other reasons, I concluded that potential competition in air freighter service is substantially weaker than in passenger airline services and recommended disapproval of the merger.

(c) Continental-Western merger application, November 1980

In this second application for a Continental-Western merger, we had the benefit of two years experience with deregulation. The economic characteristics of the industry identified in my 1978 testimony now could be empirically demonstrated; competition was vigorous, successful entry by new firms was commonplace and efficient operations required the coherent route networks that were to be achieved by this proposed merger. Moreover, my close examination of the economics of new entry demonstrated that the merged carrier could not exercise market power. I recommended that the proposed merger be approved.

(d) Texas International-Continental acquisition, May 1981

Revised Section 408 of the Federal Aviation Act poses two tests for airline mergers: a Clayton antitrust test and a "public interest" test. In this proposed merger my testimony on behalf of Continental, which was resisting acquisition, was based on an analysis of the economic motivations for the acquisition and its possible public interest ramifications. This is in contrast to the Section 7 type analysis in the Continental—Western mergers; Continental did not attempt to demonstrate a Section 7 violation arising from this aquisition. My analysis and testimony indicated that the merger appeared to be an "asset play" in which liquidation of Continental was a significant possibility and that the Board should consider the impact on competition and labor of such an event. Further, financial analyses indicated that the leveraged buyout of Continental envisioned by TI would seriously weaken Continental and TI

with possible adverse consequences for both carriers. Finally, analysis of the companies and their management did not suggest the existence of enhanced efficiency resulting from the merger. Although I raised these issues for the Board's consideration, I did not recommend that the merger be approved or disapproved.

(e) Bergt-AIA-Western-Wien merger and joint control case, April 1982

This case was a three-way merger/joint control application of two passenger carriers, Western and Wien, and an air cargo carrier, Alaska International Air. My analysis and testimony for the joint applicants in this case focused on the extent of existing competition among the three carriers, the openness and costs of entry and the availability of potential competitors. My findings were that the existing direct competition among these carriers was minor, that the points served were served by other carriers and were susceptible to entry by an adequate number of other carriers. In short, the same economic characteristics which make airline passenger services inherently competitive in the "lower 48" were operative in the region served by the carriers (Alaska). Thus, I was able to conclude that the merger would not adversely affect competition and should be approved.

Question. What type of work did you do for the Antitrust Division of the Office of the Attorney General of Texas?

Would you provide the Committee with a summary of your work or a representative sample of that work?

Answer. Our work for the Antitrust Division of the Texas Attorney General's office has been to estimate monetary damages suffered by the Texas Highway Department consequent to bid-rigging by highway contracts. The work may be used in pending litigation and cannot be provided at this time.

Question. Could you supply the Committee with all documents relating to your contract with FTC in the Pillsbury matter? Could you provide the Committee with a copy of the study you did for the FTC's Bureau of Competition in the Pillsbury case?

Answer. Enclosed is a copy of the report in its original form, revisions to that report (which were not submitted in the Proceeding) and associated documents concerning the contract.

Question. What type of work did you do for the Department of Justice, Antitrust Division in 1974, 1975, and 1976? Would you provide the Committee with a summary of that and some representative samples of that work?

Answer. I consulted with the Antitrust Division, U.S. Department of Justice on matters pertaining to competition in the airline industry. I have asked the Antitrust Division to provide you two CAB filings; one opposing a route swap of certain international routes by Pan Am and TWA, another opposing a CAB proposal for a limited deregulation "experiment."

Question. Would you list any consulting contracts you have had other than those listed in your biography?

Answer. I have consulted for the following: Alaska International Air, Arctic Slope Regional Corporation, Attorney General of Texas, City of El Paso, City of Houston, Continental Airlines, Federal Aviation Administration, Federal Trade Commission, General Accounting Office, Graves, Dougherty, Hearon and Moody, Lehman Brothers Inc., National Regulatory Research Institute, Nuclear Regulatory Commission, Page-Gulfstream, Inc., Peat, Marwick and Mitchell, President's Council on Wage and Price Stability, Purolator, Inc., Richard J. Barber and Assoicates, Inc., Scott, Douglass and Keeton, Seaboard World Airlines, Southwestern Group Financial, Inc., Texas Association of Telephone Answering Services, Trailways, Inc., U.S. Department of Justice, U.S. Department of Labor, U.S. Department of Transportation, and Western Airlines.

Question. What is the FTC's role with respect to state-regulated professionals, such as doctors and dentists? Do you support proposals to exempt such professionals from the FTC's jurisdiction?

Regardless of the eventual outcome of any pending legislative proposals, what are your personal views on this?

Answer. My personal view is that the business activities of professionals, including doctors and dentists, should continue to be subject to FTC jurisdiction. In my judgment, substantial consumer benefits may flow from appropriate review of their business practices.

Question. Should the FTC have jurisdiction over "unfair" advertising? If so, what do you consider the parameters of the FTC's "unfairness" authority?

Answer. My preliminary thinking is that the primary focus of the FTC's advertising jurisdiction should be on deception. The term "unfairness" is very vague and could conceivably be employed to rationalize a wide variety of theories of intervention not contemplated by Congress.

Question. Can you describe any work you have done for the Federal Trade Commission? Please give dates, description and summary of contract.

Answer. In addition to the work described in quesiton 3, I was appointed as a consultant to the Chairman and the Director of the Bureau of Economics on May 7, 1982. This appointment was effective through August 7, 1982. During that period my principal activity was to consult with the Director of the Bureau of Economics on the status of current research in the area of bid-rigging in sealed bid contracting.

Question. What do you think are the effects of the Commission's implementation of the FTC Act of 1980?

Answer. I do not think it is possible to describe the effects of the Commission's implementation of the FTC Act of 1980 at this time. Changes in the FTC's enforcement activity that have occurred since 1980 are no doubt caused by many factors, including the FTC Act of 1980 and a change in administration.

Question. How do you intend to avoid improper *ex parte* communications?

Answer. I understand the importance of Commissioners insulating themselves from improper *ex parte* communications. I would seek the advice of the General Counsel in defining guidelines regarding *ex parte* communications and see that my personal staff is informed and enforce those guidelines.

Question. Do you believe that a more competitive market structure is always beneficial to the consumer? If not, would you please provide the Committee with specific examples of industries in which oligopolistic or monopolistic structure, due to economies of scale or for other reasons, have provided benefits to the consumer in terms of price and increased quality that should allow such structure to continue with antitrust action?

Answer. A highly competitive market can arise from many different market structures, if measured simply by number of firms and concentration ratios. Increasing the number of firms and/or reducing concentration ratios would not always increase effective competition and would not always provide benefits for consumers if those markets are already effectively competitive. The airline industry provides numerous examples of markets and are technically monoplistic or oligopolistic, yet are effectively competitive (or "contestable") due to low entry costs. The scale economies of serving these markets, by one or a few firms, are passed on to consumers in terms of lower prices and better service.

Question. Are there particular FTC activities that you believe should be redirected or discontinued? Please specify.

Answer. It would be premature for me to propose any specific changes in FTC activities at this time.

Question. What areas of present FTC activity do you believe should be given the highest priority? Please specify the reasons for your choice.

Answer. See answer to question number one submitted by the majority members.

Question. What do you perceive to be the major shortcomings, if any, of the FTC today? Please be specific. What steps do you believe can be taken to remedy those shortcomings?

Answer. The major shortcoming, in my preliminary thinking, is the lack of a stable and clear definition of the FTC's mandate. I believe that the process of bringing greater specificity to the mandate is currently underway, for example, in the definition of unfairness and in the prohibition of applying the unfairness jurisdiction to advertising. Additional specificity would be beneficial in defining deception standards applicable to advertising.

Question. Are there any areas in which you think the Federal Trade Commission Act should be amended in order to enhance the FTC's ability to enforce its mandate? If so, what are those areas and what changes do you recommend? Are there any areas that should be cut back, transferred, or redefined?

Answer. It would be premature for me to suggest changes in the FTC Act at this time.

Question. Critics of the Federal Trade Commission have sometimes asserted that there is no demonstrable need for two antitrust agencies, and that the Bureau of Competition and the Federal Trade Commission should be merged with the Justice Department. How do you justify the continuing existence of the two antitrust agencies? If you should believe that the two antitrust agencies should exist, what is your recommendation as to how the Department of Justice and the Federal Trade Commission should operate in order to maximize antitrust enforcement?

Answer. In principle, dual antitrust enforcement by the FTC and the DOJ should be complementary and bring about more effective antitrust enforcement overall. This arises because each agency has an inherent comparative advantage deriving from the different mandates and enforcement procedures. The Department of Justice's comparative advantage arises from its dual criminal and civil jurisdiction,

which elicits a somewhat different modus operandi and focus than that of the FTC. The Federal Trade Commission, on the other hand, has a mandate that precludes criminal enforcement and sanctions, but which encourages acquisition of commercial and economic expertise. Thus, the FTC has the potential comparative advantage of advancing a more technical and conceptual approach to antitrust enforcement as well as a responsibility in its adjudicatory role of interpreting the antitrust statutes with the best and most relevant economic evidence in a coherent fashion consistent with current economic knowledge.

Question. What are your views in regard to the Robinson-Patman Act? Do you believe Robinson-Patman enforcement could be made more effective or should it be repealed or amended? If so, please explain.

Answer. I am aware that over the past ten years or so that the Federal Trade Commission and the Department of Justice have issued very few complaints under the Robinson-Patman Act. I have not personally had any experience with Robinson-Patman enforcement, nor have I closely studied its enforcement history. I do not, however, have any preconceptions as to its usefulness in protecting vigorous competition in today's business environment. I would, if confirmed, wish to review and study the record and seek the advice of public and private parties concerning the benefits of more agressive intervention in this area by the FTC. I would particularly be interested in seeing evidence of the effect on competition of the deemphasized government enforcement of Robinson-Patman over the last ten years.

Question. Do you believe the Magnuson-Moss Act has been effective in improving warranty protection to the public? Do you have any recommendations as to how this law might be made more effective?

Answer. At the present time it would be difficult to measure the effectiveness of the Magnuson-Moss Act without a better understanding as to the most beneficial configuration of warranty terms for consumers. From my reading of the Act, it seems that the Act goes a long way toward enhancing consumer welfare by simplifying and standardizing warranty terms and thereby allowing consumer preferences to be transmitted to manufacturers through their choice of products and their associated warranties.

Question. What do you believe is the role the Federal Trade Commission should play in ensuring that product information is available to the consumer at the point of sale and in advertising?

Answer. In order to fully realize the benefits of competition, consumers should have or be able to acquire relevant information about the products they purchase. Where competition flourishes, manufacturers typically find it in their interest to provide the product information considered relevant by consumers—information which consumers may supplement with information from many other sources, such as their experience, experience of others and from public and private published sources. In some instances, however, economic incentives may dissuade manufacturers from supplying relevant product information and other sources of information may be inadequate and/or too costly. In such a circumstance, if there is evidence of significant consumer injury, appropriate FTC action may include requiring disclosure of such information in advertising and/or at the point of sale. The Commission should establish criteria for such intervention so as to ensure that the purpose served by such actions is to enhance rational consumer choice rather than to supplant consumer preferences with those of the FTC.

Question. Do you believe the FTC's program in the area of advertising substantiation has been effective? What changes, if any, do you believe should be made in such a program? Do you believe that the FTC could provide information collected in the advertising substantiation program to consumers in a more effective manner? If so, how?

Answer. I have not reviewed any evidence as to the effectiveness of the FTC program in the area of advertising substantiation and have no opinion as to its effectiveness. It would be my intention, if confirmed, to review the program to see if it does improve the quality of product information provided to consumers.

Question. Do you have any views as to how corrective advertising might be used more effectively in cases where false and misleading advertisements have been presented to the public?

Answer. Corrective advertising is potentially a useful and appropriate remedy for false and misleading advertisements. The need for corrective advertising is related to the "effectiveness" of the misleading advertising. It may be useful in developing the evidentiary record in deceptive advertising cases to develop better information as to the extensiveness of the deception and its impact to provide a better basis for the adjudication and design of the remedy.

ADDITIONAL MINORITY QUESTIONS

Question 1. In his memo on the proposed FTC Food Rule, the Director of the Bureau of Economics wrote that:

"Commercial use of scientific discussions tends to increase public awareness of the issues in the debate. The more references buyers see to an issue, the greater the realization buyers will have that they have a stake in the debate and its outcome. Thus, the statement 'no cholesterol' also means 'cholesterol content is important.'"

Would you agree that deceptive commercial claims perhaps ought to be allowed, on the theory that they promote public awareness and debate of the issues involved?

Answer. No; I do not agree that deceptive commercial claims should be allowed under that theory.

Question 2. A major concern of many small business groups is the Administration's attitude toward the Robinson-Patman Act, considered the cornerstone of small business antitrust policy. For example, a recent FTC staff report suggested that illegal price preferences are being given chain drugstores in the Portland, Washington area, yet nothing has been done by the FTC to further investigate the matter. What do *you* think of the Robinson-Patman Act?

Answer. The Robinson-Patman Act addresses several areas of antitrust concern: predatory pricing, monopsony pricing and price discrimination. The Act has been frequently criticized as not being well focused to effectively police these abuses. I am not thoroughly familiar with all aspects of the Act, its defenses and its evidentiary requirements, but apparently enforcement is difficult and/or the benefits from such enforcement by government agencies has been regarded as modest. An analysis of civil cases brought under R-P in 1980 indicates that only two of eighteen cases were decided for the plaintiff. (In both cases the defendant was a small business.) I do think it is appropriate that the R-P Act be reviewed by the FTC and Congress to assess its impact on small businesses and on the state of competition generally and to consider possible changes in the Act.

Question 3. You have stated that you wish to "review" the record on Robinson-Patman enforcement. If your review indicates that Robinson-Patman enforcement is not economically efficient would you propose repeal?

Answer. See answer to Question 2.

Question 4. Does FTC enforcement of its operative statutes tend to aid, or does it hinder, the marketplace functioning of small business? Is the Commission moving in the right direction in this regard?

Answer. FTC enforcement of its operative statutes should be sensitive to its effects on small business. Speaking generally, small businesses are often at a disadvantage in acquiring the expertise and procedures for regulatory compliance and may be less able to influence the structure of those regulations. I would emphasize these concerns in the matters coming before the Commission.

Question 5. In early 1981, the Administration advocated abolition of the FTC's antitrust jurisdiction, noting the Justice Department's concurrent authority. The Assistant Attorney General for Antitrust has stated he sees no reason for two antitrust agencies, and Chairman Miller has stated he is neutral on this issue. Do you believe Congress should consider abolition of the FTC's antitrust authority?

Answer. As I have previously stated, it is my belief that dual enforcement of the antitrust statutes by the FTC and the DOJ is beneficial.

Question 6. Do you support Chairman Miller's proposal to close almost half of the FTC's regional offices? Would you support that proposal even if the FTC were appropriated sufficient funds to maintain the present regional office structure?

Answer. It is my understanding that the FTC regional offices play a valuable role in the enforcement of the FTC mandate. There are many factors which must be considered in determining the number, location and size of the regional offices, apart from overall budgetary considerations. I cannot at this time conclude whether or not any regional offices should be closed.

Question 7. The Commission is currently considering whether to continue in some form, or to terminate its line of business economic statistical reporting program. Do you believe the LOB program has contributed to performance of the agency's mission, or even to the perfection of economic understanding of business?

Answer. As a former academic economist, I can appreciate the rationale of the Line of Business statistical reporting program. I also understand that the program has significant costs borne by the agency and by the private sector. Currently the staff is reviewing the costs and benefits of the program and I will, if confirmed, take a close look at their findings which should include benefits to the agency and to general knowledge.

Question 8. Do you believe that 5(m)(1)(b) of the FTC Act is unconstitutional? If not, do you believe it should be used by the FTC? If yes, Why?

Answer. From the agency's perspective, there can be substantial efficiencies in envoicement via 5(m)(1)(b). However, I do understand that its constitutionality is under judicial review and its future use, of course, must be consistent with the judicial determination. I have no independent opinion as to its constitutionality.

Question 9. I am concerned about closed Commission meetings. Will you give us your pledge to uphold the spirit of the Sunshine Act and vote for strict enforcement of the Sunshine law at the Commission?

Answer. I will uphold the spirit of the Sunshine Act at the Commission.

Question 10. Chairman Miller has said he thinks the FTC ought to reconsider its decision not to submit its proposed and final rules to OMB for substantive pre-publication review (to be distinguished from paperwork review). Do you agree with that?

Answer. It is my belief that the type review performed by the OMB is essential to contain the regulatory burden borne by the economy. However, the FTC itself should be capable of the very same review internally, and it may be unwise to compromise the agency's independence by such submission.

Question 11. Do you support a legislative veto over the FTC's actions? Do you think the legislative veto is an effective tool of Congressional oversight?

Answer. Since major rulemaking is itself tantamount to legislation by five unelected Commissioners, some sort of legislative review is entirely appropriate. I have no firm views as to the appropriate form that review should take.

Question 12. Do you believe the current warning on cigarette packages is sufficient? If yes, does this mean you would not support rotational warnings of possible specific hazards?

If not, do you support rotational warnings of possible specific hazards (as outlined in S. 1929)?

Answer. I am aware the Director of the Bureau of Consumer Protection has endorsed legislation in this area based on a study sponsored by that Bureau. I also understand that the Commission may take an official position on this issue and it would be premature for me to come to any conclusions before I have had an opportunity to review all the available evidence.

Question 13. In your own words, please tell us what you think of Bureau Director Tim Muris' proposed standard of "statistical evidence" for FTC rulemaking before a rule can be promulgated? What evidentiary standard do you intend to apply to analysis of rules that come before the Commission?

Answer. I generally agree with Mr. Muris' desire to improve the standards of evidence used in rulemaking, including favoring the reliance on more systematic statistical, as opposed to anecdotal evidence. However, one must recognize that while we wish to obtain the best information, or evidence in making decisions, or rules, such evidence may be unavailable or too costly. Further, depending on the character of the facts being ascertained and the implications thereof, the highest level of evidence, such as might be obtained from a sophisticated statistical analysis, may not be necessary in all cases.

Question 14. Do you believe survey evidence is essential to show injury in rulemakings?

Answer. See answer to Question 13.

Question 15. Do you believe that the costs and benefits of agency action are susceptible to mathematical quantification to the extent that costs can be weighed exactly against benefits?

Answer. While I believe that the costs and benefits of agency actions are important, my personal professional experience has convinced me that exact quantification of those costs and benefits is not possible.

Question 16. Do you have any views on the proposed Funeral Rule? Do you plan to support or oppose that rule when it is considered by Congress next session?

Answer. I have not reviewed the extensive record pertaining to this rule and it would be premature for me to determine at this time whether or not I would support it in Congress.

Question 17. Should the FTC retain authority to include affirmative rules of conduct in trade regulation rules?

Answer. My preliminary opinion is that judiciously used, affirmative rules of conduct could be useful and beneficial in consumer protection, and should be retained.

Question 18. Are you familiar with the Chairman's new proposal for a revised Used Car Rule? If yes, do you support it?

Answer. I am not familiar with the Chairman's proposal.

Question 19. Do you support the per se rule of violation for resale price maintenance cases, which is currently the law set by the Supreme Court?

Would you like the FTC to bring a test case challenging the per se rule in favor of a more flexible approach?

Would like to see legislation repealing the per se rule and mandating some sort of "rule of reason" or "modified per se standard"?

Do you believe the FTC should continue to police and stop resale price maintenance under the per se rule so long as that is the law?

Answer. I believe that vigorous intrabrand competition, especially since the repeal of the fair trade laws, has generated substantial benefits for consumers. It is my understanding that the rules of evidence currently required by the Supreme Court in resale price maintenance cases are per se, opposed to a rule of reason. Although I am aware that there may be some instances in which resale price maintenance may be innocuous, or even pro-competitive, I would not favor changing its per se treatment without additional evidence that such a change would benefit consumers.

Question 20. Do you believe that manufacturers should have the right to eliminate "free riders" by prohibiting transshipments by retailers to discount stores?

Answer. It would depend on the circumstances surrounding and motivations of that prohibition. If the purpose was simply to enforce retail price maintenance, as opposed to maintaining legitimate dealership standards, the prohibition (would) be anticompetitive.

Question 21. Do you believe that transshipment prohibitions should be allowed even when the prohibitions are for price reasons?

Answer. See answer to Question 20.

Question 22. Are there any violations of the antitrust statutes enforced by the Commission that deserve per se treatment?

Answer. Yes, clearly horizontal price fixing should be treated on a per se basis. Also refer to my answer to Question 19.

Question 23. On horizontal antitrust enforcement, the FTC transition report stated the Commission should:

"Concentrate its resources on those horizontal collusion cases where injury is great and where the market will be slow to respond."

Do you agree with that? Not one horizontal price-fixing complaint has yet been issued by the FTC in this Administration. Are you concerned by that?

Answer. I should expect that there is a substantial lead time before such cases under preliminary investigation are made public. I am not able to ascertain the actual level of such activity which is not public information.

Question 24. Should sizable economic efficiencies be considered as part of the legal analysis of proposed horizontal mergers? As a defense?

Answer. If the economic circumstances of the market suggest that a merger's "substantial economic efficiencies" would be beneficial to consumers in that market, as well as the merged firm such a factor should legitimately be considered in the legal analysis as well as in the defense.

Question 25. Should economic considerations be accorded primary over social, political and other considerations in analyzing and evaluating mergers?

Answer. It is my understanding that the Clayton Act directs us to evaluate the economic consequences of a proposed merger. I am not aware of any social or political guidelines set down by Congress to guide us in appraising mergers.

Question 26. The Supreme Court has recognized violations of the Clayton Act involving vertical mergers. Some economists have criticized this approach to the Clayton Act because it does not acknowledge efficiencies that result from such mergers. What is your position on vertical mergers generally?

Answer. Vertical mergers should be scrutinized to ensure that substantial market power at one stage of production is not transferred up or downstream by the merger. Detection of the resulting consumer injury would arise from an analysis of its horizontal implications at both stages of production.

Question 27. The FTC Economics Director has said, concerning mergers, that he would like to conduct "a natural experiment in the economy," where "you would allow a lot of mergers to go through. You would allow a lot of people to put their money on the line, and we'll see what happens. If there are anti-competitive results, we can try to unscramble the eggs."

Do you endorse such a "natural experiment?" Should the experiment fail, how difficult do you think it would be, legally and practically, to unscramble the eggs?

Answer. I would not endorse such a "natural experiment".

Question 28. In the merger guidelines published June 14, 1982 by the FTC what are the key differences in the FTC and the approach of the Department of Justice?

Answer. From my reading of the two sets of guidelines I do not see any important substantive distinctions. Although clearly the DOJ guidelines are more explicit in defining markets, market shares and critical Herfindahl-Hirshman Index values,

the approach described in the FTC guideline would, in my opinion, yield basically the same results.

Question 29. Tom Campbell, Director of the Bureau of Competition, has suggested changes in the "failing company" defense to Clayton Act charges. Are you familiar with these suggested changes?

If yes, do you agree?

If no, the changes are (1) limiting the length of time that a company must spend seeking the least anticompetitive purchaser, (2) reducing the number of "cures" a company must try before requesting a merger, (3) relaxing the requirement that a company must be literally failing before merger, (4) requesting FTC informal opinion, and (5) greater recognition of the failing division defense.

Do you think these changes are needed?

Answer. I have not read the paper in which these suggestions were made. As these are important issues it would be premature for me to comment on these proposals without further study.

Question 30. In the June 14, 1982 merger statement the Commission voted to consider the failing company defense only in deciding whether to bring a case. Do you agree?

Answer. The referenced merger statement the Commission addressed the failing division defense. While it states that it would limit such analysis to its prosecutorial discretion due to difficulties of proof, it would appear to me that in some instances the anticipated difficulties of proof may not be present, and such a defense might be legitimately employed.

Question 31. The Commission has enjoyed limited success in the Courts of Appeals in Clayton Act cases involving the potential competition theory. Do you believe there is continued economic validity to this theory, and if so, do you believe use of the theory could be improved in any general or specific way?

Answer. Potential competition may in some circumstances be very important in disciplining competition in concentrated markets. There is economic validity to this theory and it should be applied in those instances where it is appropriate.

Question 32. Regulatory intervention resources have been substantially increased recently. Do you agree with that? Do you think it is a cost-effecitve use of resources for the FTC to be advocating free market, deregulatory policies before other federal agencies which, in this Administration, are already committed to minimum government intervention in the marketplace?

Answer. I have no basis for knowing whether regulatory intervention has increased or decreased recently. I do think that it is a proper and cost effective use of the government's resources for the FTC, with its already existing resources and expertise, to assist other agencies in ascertaining the competitive impact of various regulatory alternatives they might consider.

Question 33. Do you believe that the FTC should intervene or file amicus briefs in private or state antitrust cases in federal and state courts? What standards would you apply in selecting candiates for amicus treatmet?

Answer. I believe that it is appropriate for the FTC to file amicus briefs in federal and state courts when invited by the court or law enforcement agencies, or when the issues raised are likely to have a significant impact on consumer welfare.

Question 34. Should the issue of FTC authority over the state regulated professions be decided by Congress since this jurisdiction has been in question for some time?

Answer. I believe that the business practices of state regulated professions should be subject to FTC jurisdiction.

Question 35. Do you support a clarification that the FTC's jurisdiction does not extend to the professions?

Answer. See answer to Question 34.

Question 36. How should the FTC evaluate an ad targeted at all consumers but relevant to a vulnerable group as well?

Answer. The FTC should assess how consumers actually perceive the claims of an ad. If the product is targeted to a vulnerable group, that group's perceptions of the ad should also be explicitly measured and considered when assessing deception.

Question 37. Tim Muris said at a November 16th Antitrust ABA meeting, "As long as deception is not defined, the practical effect of exempting unfairness from advertising cases is *not* that great." Do you agree? Why or why not?

Answer. I am not sufficiently acquainted with the precedents defining deception to address this point.

Question 38. How can the administration of predatory pricing be a "two-edged sword?" Would economic guidelines help? Why or why not?

Answer. Vigorous price competition is often charaterized by prices temporarily below average or even marginal costs. If such instances are miconstrued as predatory pricing, consumers would be denied the full benefits of price competition. Economic guidelines, by reducing uncertainty would facilitate lawful competitive price competition.

Question 39. Currently, there exists a number of different legal standards for "predation" cases. The conservative approach espoused by Assistant Attorney General Baxter and Chairman Miller requires evidence that a company acquired 50 percent or more of the market by its pricing actions. The FTC has employed a more liberal approach under Section 5 of the FTC Act requiring a showing of below cost selling over a long period of time.

By what legal standard would you judge a "good" predation case? What elements do you consider necessary to establish such a case? Do you agree or disagree with the Commission's traditional approach?

Answer. These are important issues that I would likely consider in an ajudicatory role should I be confirmed. I would not wish to set out such explicit standards at this time.

Question 40. Do you believe that the Commission should abandon rulemaking or are there instances where rulemaking would be appropriate to deal with a clear industry-wide problem? If you believe rulemaking could be appropriate, please define the circumstances where you would favor such an approach.

Answer. Rulemaking can be an efficient tool for the enforcement of the FTC mandate in some instances. The rulemaking procedure affords a closer look at practices that may affect many businesses and consumers than could be accomplished by separate cases, and at a lower cost. Circumstances that suggest rulemaking include a prevalence of the type activity questioned, a similarity of its effects wherever the practice exists and the existence of significant injury to consumers from those practices.

Question 41. The FTC has been aggressive in the past in seeking to litigate against business activities many have considered lawful prior to FTC attack. Would you give consideration to a redefinition of the FTC's role so that it could advise and counsel business in a non-adversarial way?

Answer. It would appear to me that such non-adversarial communication is altogether consistent with the FTC's existing mandate and I would encourage such developments.

Question 42. What is your opinion of the Paperwork Reduction Act—an act which requires OMB review of all paperwork requirements imposed by the FTC?

Answer. The Paperwork Reduction Act is one important facet of a healthy trend to reduce the regulatory burden on our economy. I believe that it is altogether approprite for the FTC to reassess its compliance requirements in this light.

Question 43. Are you familiar with S. 1215, the Malt Beverage Interbrand Competition Act? (If not: the bill provides that it is not a violation of the antitrust laws to make and enforce exclusive territorial agreements for the sale of beer when it is in substantial competition with other malt beverage products within that territory.) Do you support such a clarification? If yes, do you support the bill?

Answer. I am not familiar with the bill and have no opinion as to its merits.

Question 44. Are you familiar with S. 1256, the Office Machine and Equipment Retail Dealers Agreement Act? (If not: S. 1256 is a bill to provide a cause of action for office equipment dealers who are not dealt with in good faith by manufacturers.) It has been criticized by the FTC. Would you please review the bill and give us your thoughts on it? It passed this Committee without objection.

Answer. I have reviewed S. 1256 and have particular concerns with the provisions of Section 3, which apparently would allow existing dealers to effectively block new entry by other dealers into their market area. This provision is contrary to well founded antitrust principles and could cause significant injury to consumers of those products.

YALE UNIVERSITY,
New Haven, Conn., October 1, 1982.

Senator ROBERT PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, Senate Office Building, Washington, D.C.

DEAR SENATOR PACKWOOD: I am writing in support of George Douglas's nomination as a Federal Trade Commissioner. I have known Douglas for approximately twenty years. I was his teacher and thesis advisor when he was a graduate student

at Yale and I have followed his career since. His scholarship is first rate and shows an independent and non-doctrinaire mind at work.

I believe Douglas would be a strong commissioner. He is a man of great intellegence whose professional training and practical experience provide excellent preparation for that role.

His personal characteristics complement his professional strengths. He cares about doing things right, is open minded and fair, and is objective in approaching any particular problem. I commend him to you.

With best regards.

WILLIAM. C. BRAINARD.
YALE UNIVERSITY,
New Haven, Conn., September 24, 1982.

Senator BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, Senate Office Building, Washington, D.C.

DEAR SENATOR PACKWOOD: I write to support the appointment of George Douglas to the Federal Trade Commission. I have known Douglas since he was a student at Yale, where I taught him in several classes and supervised his Ph.D. dissertation. I have known him well ever since and have followed his career. He would be an outstanding member of the FTC. He is a first-rate economist, expert in analytic and statistical tools and their application in concrete situations. He respects facts and knows how to dig for them. He is a man of common sense and realism. He is independent in mind, not in any way doctrinaire or ideologial. In his career in academia, government, and private consulting, in his research and writing, he has gained experience and knowledge and perspective in areas relevant to the work of the FTC. This would be an excellent apointment, thoroughly professional and non-political, and I recommend it with enthusiasm.

Sincerely yours,

JAMES TOBIN,
Sterling Professor of Economics.

HYDEMAN, MASON, BURZIO & LLOYD,
Washington, D.C., September 23, 1982.

Hon. ROBERT PACKWOOD,
U.S. Senate,
Washington, D.C.

DEAR SENATOR PACKWOOD: Having read press reports which suggest that George Douglas would be a "clone" of FTC Chairman Jim Miller because they once collaborated on a book urging airline deregulation, I felt compelled to offer a rebuttal to these reports. I am doing so, not because I hope to ingratiate myself with a potential FTC member (I do not practice before the FTC), but because I have a strong personal belief in George Douglas' capabilities and independence of mind.

I have worked with George Douglas on a number of merger and acquisition cases during the past several years. Both publicly and privately, George has consistently displayed a strong philosophical commitment to antitrust enforcement. Indeed, George's criticism of airline regulation was premised in large part on the anticompetitive policies of the CAB that had stifled price competition and blocked new entry. George's view has always been that effective competition provides the greatest protection against excessive prices, poor service and inefficient business practices. In his role as a consultant for private firms, George has been remarkably independent—often frustrating his own lawyers, who try to tailor the views of their clients' consultants to the exigencies of a particular case. In short, George has a tough, independent mind. He is nobody's clone.

The suggestion in the press that George might not be competent because of errors in a minor study that his firm had done for the FTC is nonsense. While I cannot speak to that case, I can say that all of the work George and his firm did for my clients, Continental Air Lines, Western Air Lines and Alaska International Air, has been absolutely first rate. Even the opposition grudgingly admired the quality and effectiveness of George's presentations.

Finally, while I am tempted to rebut the argument that George may not be a Democrat, I will leave that to others. As a member of the Texas Bar and a former resident of Texas, I will say that party affiliation is not always reflected in support for a particular candidate in that State. The main point I would like to make, however, is that George Douglas is a person of intelligence, integrity and independence

of thought who would be an asset to the Commission and serve the public well. I urge that his nomination be confirmed.

Sincerely,

JAMES T. LLOYD.

TULANE UNIVERSITY,
New Orleans, La., September 28, 1982.

Hon. ROBERT PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, D.C.

DEAR SENATOR PACKWOOD: I am writing to support the nomination of Dr. George Douglas for the vacancy on the Federal Trade Commission. By way of introduction, I served for four years in the Carter Administration Labor Department, first as Special Assistant to Secretary Ray Marshall and later as Deputy Assistant Secretary for Employment and Training.

I first met Dr. Douglas in the mid 1970's when we were colleagues for one year in the Economics Department at the University of Texas at Austin. During my service at the Labor Department, Dr. Douglas served as a consultant on Occupational Safety and Health Administration regulations. Since one of my major responsibilities in the Secretary's office was the monitoring of these regulations, I came to know the work of Dr. Douglas and his associates at Southwest Econometrics quite well.

In these associations, I have always found Dr. Douglas to be a first-rate economist. He has an exceptionally sharp, analytical mind. Dr. Douglas is both fair and open-minded when considering tough, ambiguous policy questions. It would be a mistake to characterize him as an ideologue or captive of any particular school of economic thought.

In summary, I enthusiastically support Dr. Douglas' nomination. Please let me know if I can provide additional information.

Sincerely,

CHARLES B. KNAPP,
Senior Vice President for Operations.

UNIVERSITY OF MARYLAND,
SCHOOL OF PUBLIC AFFAIRS,
College Park, Md., September 22, 1982.

Hon. BOB PACKWOOD,
Chairman, Senate Commerce Committee,
Washington, D.C.

DEAR SENATOR PACKWOOD: I am writing at my own initiative to acquaint you with my views on the professional qualifications of Dr. George W. Douglas, nominated by President Reagan to a seat on the Federal Trade Commission.

I do not take this step lightly. I was a member of the President's Council of Economic Advisers in the previous Administration. My duties involved me in many areas of regulatory reform. I have been extremely disturbed by the activities being undertaken by this Administration under rubric of "regulatory relief." And I have made my concerns known publicly.

Yet so great has been my distress at seeing the professional qualifications of Dr. Douglas questioned that I have decided to put aside my displeasure and write this letter.

I have known George Douglas for nearly a decade. I have read the majority of his published output. I have seen material he has prepared as a professional witness in cases both when I agreed with his views (in the Domestic Passenger Fare Investigation) and when we were on opposite sides (in the first Continental-Western Merger case.)

Throughout this period, whether opposing a position being advanced by Dr. Douglas, working on the same side of an issue with him, or exploring in a friendly way a point of pure scholarship, I have never known him to produce work of other than highest professional quality. His willingness to listen and to subject all points of view—even his own—to critical scrutiny has always impressed one.

If Dr. Douglas were confirmed by the Senate as a member of the Federal Trade Commission, I would not expect to agree with all his positions. But I would expect any conclusions he reached to be well-reasoned and formed only after careful and

fair deliberation. I especially would expect him to exercise independent judgment, for I have always known him to be very much his own man.

One of the things I was proudest of in the Carter Administration was the efforts we made to appoint highly qualified people to independent regulatory commissions. In my opinion, the Reagan Administration appointments have not always met a similarly high standard. But in Dr. Douglas' case, I have absolutely no qualms concerning quality. Indeed, I consider the Administration's willingness to appoint someone of Dr. Douglas' unquestioned professional ability to a post on the FTC to be an extremely promising sign.

I hope that this letter proves to be of some help to the committee in its deliberations concerning the nomination of Dr. Douglas. Should the committee wish, I would be prepared to repeat these views in person at the committee's hearing.

Sincerely,

GEORGE C. EADS.

STATEMENT ON BEHALF OF AMERICAN OF MADISON, INC., BY LEONARD S. MATTIOLI, CHAIRMAN OF THE BOARD, GEORGE A. REUHL, PRESIDENT, AND MARY K. RYAN, CONSUMER ADVOCATE

American of Madison has been in business for approximately 13 years. It is a retail operation with stores in Madison and Appleton, Wisconsin and Marquette, Michigan. We specialize in consumer electronic products. Last year our gross sales were $86,000,000. We processed over 414,000 transactions with an average dollar value of $208 per transaction. Our customers are drawn from the entire state of Wisconsin and thousands come from Illinois. We estimate that approximately one million consumers pass through our Madison store alone on an annual basis.

American has built both its business and its reputation on making goods available to consumers—goods that had not been previously available at prices consumers could afford until American entered the market. We have built our business around the principle of discounting and by servicing the products we sell. Our customers are intelligent and informed—they have to be since we negotiate prices and constantly turn over a large and ever-changing inventory of increasingly more technical products, including computers.

Our company continues to grow but we are concerned about the position which some members of the Administration are taking, misguidedly in our view, with regard to resale price maintenance. A return to resale price maintenance would be a return to a policy that historically produced higher retail prices for the American consumer and which restrained price competition at the retail level. This issue is therefore relevant to the deliberations of the Subcommittee on the nomination of Professor George W. Douglas to be a Federal Trade Commissioner to help preside over an agency which is an arm of Congress and which shares responsibility with the U.S. Department of Justice to enforce the nation's antitrust laws. Unless the nominee makes a clear commitment to enforce existing law which outlaws resale price maintenance and which has been reaffirmed by the U.S. Supreme Court as recently as 1980, then the nomination should be defeated by this subcommittee.

We realize that a presidential nominee is seldom rejected unless a strong case is made to do so. That is the purpose of this statement. We wish to have it included in the record of the hearings on this nomination.

For about a year now, the Chief of the Antitrust Division of the U.S. Department of Justice, Mr. William F. Baxter, has been publicly advocating the abandonment of the "per se" rule under the Sherman Antitrust Act, as interpreted by the U.S. Supreme Court. The "per se" rule holds that manufacturer enforced retail prices is price fixing and is, therefore, a per se violation of the nation's antitrust laws. Mr. Baxter explained his rationale for wanting to allow manufacturers to enforce retail prices in a letter to the American Retail Federation, August 6, 1982. In that letter he argued that resale price maintenance can be a pro-competitive tool, but careful scrutiny will reveal that his arguments are largely based on theory and not on any factual case experiences. If Mr. Baxter is correct, such case experiences should not be difficult to find since resale price maintenance was the norm during the period when Fair Trade laws were in full bloom. (It should be noted here that in 1975—only seven years ago—Congress eliminated the federal antitrust exemption which had allowed states to enact fair trade laws.) The absence of such case experiences to support his proposition cast serious doubt on Mr. Baxter's arguments. It is also clear after reading the referenced letter that Mr. Baxter developed his economic theories without the benefit of consultation with business and consumer leaders who operate in the marketplace rather than in university classrooms.

Mr. Baxter has been joined in his efforts to abandon the "per se" rule by the current Chairman of the Federal Trade Commission, Mr. James C. Miller, III. To be more precise, Mr. Miller holds that the Federal Trade Commission should determine on a case-by-case basis whether the per se rule should govern. This position, if it were to be the majority position, would have and probably already has had a dampening effect on the FTC's efforts to enjoin price fixing between manufacturers and retailers.

Mr. Miller outlined his position in a speech before the National Retail Merchants Association on October 11, 1982—a position that unfortunately also seems to have been developed without consultation with business and consumer leaders who could provide valuable insights into the market phenomena, namely, higher consumer prices, that predictably would result from a return to resale price maintenance.

Finally, Mr. Miller and Mr. Baxter have another ally in Mr. Thomas J. Campbell, currently the Director of the Bureau of Competition at the FTC, who announced at a November 16 conference sponsored by the American Bar Association's Antitrust Section in Washington, D.C. that he would apply the "rule of reason" principle, the principle supported by Baxter and Miller, when deciding whether to challenge resale price maintenance. Paraphrased, this means that Mr. Campbell, who is not a Commissioner—who is not a Federal Judge—who is only a staff member of the FTC—will not enforce the law as interpreted by the U.S. Supreme Court. Mr. Campbell seems to be assuming to himself that which the "checks and balances" provisions of the U.S. Constitution reserve to the Judiciary.

This line-up of Federal policy makers is not only formidable, their public statements are introducing an uncertainty into national economic policy that did not exist, and which is jeopardizing the economic interests of both retailers and consumers. Change is occurring—just look to Mr. Campbell's statement—change which could be adverse to the public interest and which is occurring without the benefit of public debate and oversight in the forums that were established by the Constitution and the U.S. Congress to insure that all affected parties might be heard.

It is for these reasons that we are concerned about Mr. Douglas' nomination. We are admittedly not privy to a great deal of information about Mr. Douglas' credentials or his competency to serve as an FTC Commissioner. All that we know is that he is rumored to have been handpicked by Chairman Miller. If that means that Mr. Douglas is of the same philosophy, namely 1) that resale price maintenance has a pro-competitive value and 2) that the FTC has the discretion not to enforce the laws enacted by Congress as interpreted by the highest court in the land, then we urge the Subcommittee to reject the nomination.

Significant changes in the law should only occur in an orderly fashion and after prolonged public debate, not through administrative decisions that are not subject to effective oversight. Mr. Douglas' nomination, for example, could tip the scales in favor of resale price maintenance through petitions to re-open consent decrees that presently prohibit manufacturers from enforcing retail prices. While the FTC's petition process is open to public comment, most firms like American of Madison, who could be adversely affected, do not and cannot monitor the FTC on a daily basis. This is both an economic and polticial reality that should temper administrators who are entrusted with the public interest to avoid precipitous changes in the law. This reality should also prompt them to find more open processes for establishing precedents or for overturning laws which affect so many and around which entire industries have developed.

This Subcommittee has a difficult task. Commitments made in the nomination process and assurances of future objectivity are not easily enforced once the appointment is assured. This too is a political reality. We and other discounters are not comfortable with the rhetoric of some Administration officials and believe this appointment is a watershed for national antitrust policy. As discounters, we are acutely aware of the benefits we have brought to American consumers. Our contributions should be carefully evaluated and no appointments made to government policy positions that would result in depriving the American economy of those contributions, namely sales volume, lower consumer prices and product innovations, measured in real rather than in theoretical terms.

[Whereupon, at 10:50 a.m., the committee was adjourned, to reconvene at the call of the Chair.]

NOMINATION– CIVIL AERONAUTICS BOARD

TUESDAY, DECEMBER 14, 1982

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C.

The committee met, pursuant to notice, at 9:04 a.m., in room 235, Russell Senate Office Building, Hon. Nancy L. Kassebaum (presiding).

Staff members assigned to this hearing: Anne G. Cantrel, staff director; and Charles M. Barclay, minority staff counsel.

OPENING STATEMENT BY SENATOR KASSEBAUM

Senator KASSEBAUM. The hearing will please come to order. I would like to read a statement which Senator Tower was planning to give, but he had to go to the White House for an early meeting. So if I may, I will just read his statement as I am sure he would like to have a proper introduction made.

STATEMENT OF HON. JOHN TOWER, U.S. SENATOR FROM TEXAS

It is both an honor and a pleasure to introduce to you today Ms. Diane Morales of Houston, Tex., as the President's nominee for membership on the Civil Aeronautics Board.

As deregulation of the airline industry progresses, the ability of the CAB to coordinate and to be responsive to the needs of the airlines and the traveling public will become critical to our goal of an even transition.

Having distinguished herself in the fields of marketing and public relations, Ms. Morales has also served as Deputy Assistant Secretary for Policy in the Office of Territorial and International Affairs, Department of the Interior, and most recently has been appointed Special Assistant to the Secretary of the Interior. Ms. Morales has also proven herself in her appointment as Commissioner on the Native Hawaiian Study Commission. With the unique demands of the deregulation process, it is particularly appropriate that nominees to the Civil Aeronautics Board have the numerous and varied qualifications which Diane Morales possesses.

In addition to her professional achievements, Ms. Morales has also been active in civic organizations as well as party politics. Ms. Morales considers her lack of specific airline experience an asset in that she will bring no bias or prior obligation to this position. Rather, in my view, she has experience in and command of the particular demands of a market environment, and this will be an invaluable resource to both the CAB and the industry.

I recommend without reservation that Diane Morales be confirmed as a member of the Civil Aeronautics Board. Her term of service will be, I am certain, one marked by the same level of distinction she has achieved in all of her previous endeavors.

Ms. Morales, do you wish to make any statement or comments before I ask a few questions?

STATEMENT OF DIANE MORALES

Ms. MORALES. No, Senator, I have no statement at this time. I am ready to answer your questions.

Senator KASSEBAUM. I have your biographical sketch and also a letter from Senator Pressler to Senator Packwood which I will insert in full in the record. However, I would like to read part of it.

As I am sure you are well aware, my home State of South Dakota has been one of a number of rural States which has suffered drastic loss of air service and steep ticket price increases as a result of airline deregulation. I have been genuinely pleased with the Board's responsiveness to South Dakota's small communities which are struggling to maintain some kind of central commercial air service.

I would ask that in your position as a member of the CAB you pay particular attention to EAS proceedings and consider carefully the needs of rural Americans who live far distances from large cities and rely on dependable and affordable airline service to bridge these distances.

[The biographical sketch and letter referred to follow:]

BIOGRAPHICAL SKETCH OF DIANE K. MORALES

Address: 1200 N. Nash; Arlington, Virginia 22209; Date and place of birth: July 11, 1946; Houston, Texas; Marital status: Single; Education: Unversity of Texas. BA, 1968.

Employment record: 1981 to present—Deputy Assistant Secretary for policy, Department of Interior, Office of Territorial and International Affairs; Special Assistant to the Secretary of Interior; Commissioner and Committee Chairman of the Native Hawaiians Study Commission, Washington, D.C. 1980-1981—Senior Associate and Manager of Marketing Services, 3D/International, Inc., Houston, Texas. 1971-1980—Department manager, assistant buyer, executive trainee, Neiman-Marcus, Dallas, Texas. 1970—Public relations representative, Gittings/Neiman-Marcus, Dallas, Texas. 1968-1970—Advertising account executive, Goodwin, Dannenbaum, Littman and Wingfield, Inc., Houston, Texas.

Government experience: July 1981 to present—Deputy Assistant Secretary for policy, Department of Interior, Office of Territorial and International Affairs; Special Assistant to the Secretary of Interior; Commissioner and Committee Chairman, Native Hawaiians Study Commission.

Memberships: Houston Chamber of Commerce, Governmental Relations Committee; Houston Interamerican Chamber of Commerce, board member and Public Relations Committee chairman-elect; Corporate Community Task Force, Houston Clean City Commission; Society for Marketing Professional Services (SMPS); Dallas Museum of Fine Arts.

Political Affiliations and Activities: Dallas Council of Republican Women's Clubs, board member and program chairman, 1980; Dallas County Men's Republican Club, board member and program chairman, 1980; Downtown Dallas Women's Republican Club, president—1980, first vice-president—1979, community affairs chairman—1978; chaired and assisted on various political campaigns, committees and fund-raising dinners.

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, D.C., December 14, 1982.

Hon. BOB PACKWOOD,
Chairman, Committee on Commerce, Science, and Transportation,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I am pleased to see this Committee act expeditiously on the nomination of Ms. Diane K. Morales to be a member of the Civil Aeronautics Board.

Ms. Morales' past record in both the public and private sector speaks well of her ability as an able administrator. I am confident that she will, as always, do an outstanding job in her role as a member of the Civil Aeronautics Board, and I strongly support her nomination to that position.

As I am sure you are well aware, my home state of South Dakota has been one of a number of rural states which has suffered drastic loss of air service and steep ticket price increases as a result of airline deregulation. I have been generally pleased with the Board's responsiveness to South Dakota's small communities which are struggling to maintain some kind of essential commercial air service. I would ask that, in your position as a member of the CAB, you pay particular attention to

EAS proceedings and consider carefully the needs of rural Americans who live far distances from large cities and rely on dependable and affordable airline service to bridge these distances.

I look forward to working with Ms. Morales and the other members of the Board in the future.

Sincerely,

LARRY PRESSLER, *U.S. Senator.*

Senator KASSEBAUM. As you can see from the very beginning that is one of the important problems the CAB deals with.

Because I was frequently asked when I was running for Senator, what my qualifications were to be a Senator, I would like to ask you, Ms. Morales, what special qualities in your background do you feel qualify you to serve on the Civil Aeronautics Board?

Ms. MORALES. Actually, Senator, I feel that my past experience is directly related to the consumer-oriented, competitive marketplace into which the airline industry is moving. My experience in the commercial sales arena and the capital-intensive construction industry exposed me to the motivations of industry executives as they make the hard choices to assure economic viability.

Also, in advertising, public relations and marketing, I feel I have certainly become sensitive to the needs of the public.

At the Department of the Interior, my decisionmaking and management experience aided me in dealing with the social and economic issues facing our U.S. territories. I feel this combination of experience qualifies me to handle the complex policy issues that now face the CAB. I have a commitment to the President's program to minimize Government interference in private industry, and I support the congressional mandate to deregulate the airline industry and to sunset the CAB.

Senator KASSEBAUM. That leads right into my second question which is the sunset of the CAB and some of the major issues that we have to deal with. As we decide exactly how and when, we seem to be putting off further and further many of the major decisions which we have to make. I would like your analysis of some of the major issues that have to be resolved before any final close-down of the CAB, and do you believe that a case can be made for continuing the CAB perhaps with a smaller number of Board members.

Ms. MORALES. I think the major issues fall into certain categories. We must prepare for the transfer of those functions, authorities, and personnel that are outlined presently in the Airline Deregulation Act, and I believe a great deal of that work has already been accomplished.

The second part is that we need to address those functions and authorities that have not been outlined specifically in the ADA. Consumer protection, for example, is an area that has not specifically been addressed and needs to be.

Last, I think we need to resolve the question of whether or not there is proper political insulation in the executive branch, which will receive these new programs.

I cannot think of a case for which I would advocate extending the life of the CAB, even with fewer members. I feel the CAB should sunset. Congress, through its debate, realized at the time the CAB needed to be sunsetted and prepared for doing so. We should carry out that mandate.

Senator KASSEBAUM. Do you favor sunset before January 1, 1985?

Ms. MORALES. I favor sunsetting before 1985 if the Board has prepared for the proper transfer of these functions to other agencies, and if we have resolved the outstanding issues.

Senator KASSEBAUM. Some of the critics of deregulation—and they seem to be growing—argue that travelers from smaller communities are paying much higher fares and subsidizing travelers in the more competitive markets in the long haul. They propose that fares be reregulated. What do you think about these arguments, and has the Board taken any steps to investigate the merits of these allegations?

Ms. MORALES. I am certainly against reregulation of fares. It is just at the end of this month that the CAB will actually lose its total authority for regulating fares. I have heard the arguments about the variation in fares in terms of distance, but distance is only one of the factors that goes into determining what a fare should be. We have said that we would allow the free market to operate.

Under dergulation fares seem to, be more closely related to cost. And the cost does decrease, or seems to decrease, as passengers and distance increase. Right now, in the dense, competitive markets—really density is the major factor—we have overcapacity that is causing a downward trend in pricing. New competitive, low-cost carriers have come in and offered lower fares in these competitive markets, and they, too, have driven the fares downward.

Conversely, in the small communities you have fewer passengers, a shorter distance, less efficient use of fuel and less competition in price. Perhaps that condition will not always exist, but it seems to exist at this moment.

Senator KASSEBAUM. One of the things that Senator Pressler was writing about was essential air service and his concern about the smaller communities and exactly how much air service can be maintained and should be required to be maintained as part of the essential structure, the air service, as we consider it.

Now, think of it in terms of feeding into the hub aspect. Suppose that one of the areas where it has been most troublesome to the CAB is the determination of international structure. After several weeks of international aviation negotiations the United States has agreed to restrictions on services at existing gateways with the United Kingdom and capacity restrictions with Venezuela. Some officials have indicated that recent U.S. policy in general has been directed largely toward helping a specific U.S. airline.

Do you believe it is proper under the International Aviation Competition Act of 1979 to sacrifice the broader interests of consumers and other U.S. airlines to aid a particular airline?

Ms. MORALES. I cannot speak to the specific airline that is being discussed, but as far as the act is concerned, the overall goal is to encourage competition, and I certainly support that goal.

At the same time, I think we should consider the position of all U.S. carriers. They do go hand in hand. We do have an obligation to the carriers, but the overall goal is competition, and certainly not to favor one particular airline.

Senator KASSEBAUM. Do you think that particular function and involvement of CAB should be moved to the Department of Transportation?

Ms. MORALES. Yes, I do. I know that there have been discussions——

Senator KASSEBAUM. Do you have any concern that it might become too political?

Ms. MORALES. Senator, as a current member of the executive branch, I feel that when the President made his nominations, he appointed people of high integrity to both independent regulatory agencies and the executive branch. I have seen first hand the executive branch dealing with regulatory programs and policies, and administering many programs in general. They have done it very well.

They differ often with the White House. They have differed many times with the suggestions of OMB, and have stood their ground and fought it out. I do not feel that a wave of the wand from the White House necessarily means that they would succumb. I think good judgment will be used.

But I do understand that in the spring the Department of Transportation is holding a public forum to develop a situation that will be amenable to more people. I am sure there are other issues involved that I will need to study, but as a member of the executive branch, I do not have the same types of fears that others have.

I do have confidence in DOT's ability, but I am sure that I need to study the situation more.

Senator KASSEBAUM. I think everybody is concerned about some of the decisions that have to be made in this transfer and where the transferred responsibilities should go.

Under the Airline Deregulation Act, the CAB is required to determine whether airline deregulation is a major cause of a substantial contraction or bankruptcy of an airline. Applications of affected employees have been on file with the Board for some carriers for several years, and the agency has not decided a single case. What priority would you attach to resolving these cases fairly and expeditiously?

Ms. MORALES. I understand that the employee protection program is a shared responsibility between the CAB and the Department of Labor, and I certainly plan to do my part to resolve these cases.

Senator KASSEBAUM. I touched earlier on the essential air service [EAS] and Senator Pressler's comments. What really do you believe is the function of EAS, and do you believe the CAB should remain closely in touch with EAS communities? Or do you think this is a program which can be effectively administered from Washington?

Ms. MORALES. Fortunately, in my present position at the Department of the Interior, a good deal of my time has been spent on essential air service to our U.S. territories. It is of grave concern to them. They, too, have been through a reduction in departures, loss of major airline service, and new commuter service. They even went through an airline merger, which caused a great upheaval because of their concern as to whether or not any service would survive. As a result, I feel very sensitive to the unique needs of isolated, small communities.

Under the Airline Deregulation Act, of course, the function is to protect small communities from loss of service. As far as I can tell, the Board has done a very good job in following Congress intent.

Congress mandated, in the ADA that the Board weigh heavily the concerns of the communities, and I understand our field offices have done a superb job of coordinating that effort and successfully fulfilling that mandate.

The EAS service program, including the field offices, will move intact to the Department of Transportation; therefore, I am sure this program will continue to be well coordinated.

Senator KASSEBAUM. You share the belief that this is an important program.

Ms. MORALES. Absolutely.

Senator KASSEBAUM. And having worked with it, you understand it.

Ms. MORALES. Absolutely. The Department of the Interior has dealt a great deal, of course, with Alaska, and everyone realizes how isolated and remote some of those areas are. They are totally dependent on air service. Having firsthand experience, I do feel especially sensitive, to the issue. Certainly Congress was, too. They allowed 6 years for the sunsetting of the CAB, and yet they granted 10 years for the EAS program, in order to ease the transition.

I support the extra emphasis given the EAS program.

Senator KASSEBAUM. Thank you very much. It will be an interesting time ahead for the CAB, and I am sure Chairman McKinnon, who is here, would be willing to offer some very sound advice. And one, I think, learns a lot as they go along, but it is not always as easy as it might seem in transferring authority which for a long time has resided in one place. And I myself, in being a part of sunset hearings, came to appreciate the fact that we don't seem to be eliminating very much, but simply moving a lot of it laterally.

And I think as we analyze some of the effects, it is going to be very important to us and more incumbent, on the CAB and its members, to offer some sound advice on how these responsibilities should be assumed and by whom if they are to continue. It is a serious question for us in the continuing functioning and strengthening of our airway system.

So I wish you well, and thank you for your attendance this morning.

Ms. MORALES. Thank you, Senator.

[Whereupon, at 9:24 o'clock a.m., the hearing was adjourned.]

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